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June 30, 2011

VIA E-MAIL AND MESSENGER
U.S. Environmental Protection Agency, Region 5
Scott Hansen, Remedial Project Manager
Superfund Division (SR-6J)
77 W. Jackson Boulevard
Chicago, IL 60604-3590
hansen.scott@epa.gov

RE: Good Faith Offer Regarding Ashland/Northern States Power Lakefront Site, Ashland, Wisconsin

Dear Mr. Hansen:

In accordance with the U.S. Environmental Protection Agency's ("U.S. EPA's") April 27, 2011 Special Notice Letter regarding the Ashland/Northern States Power Lakefront Site in Ashland, Wisconsin (the "Site"), Wisconsin Central Ltd. ("WCL") and Soo Line Railroad Company ("Soo Line" and collectively with WCL, the "Railroads") submit the following good faith offer.[1] For the reasons detailed below, the Railroads are not prepared to execute the Consent Decree that was enclosed with the Special Notice Letter. However, the Railroads are prepared to enter into an administrative order on consent, or other appropriate form of agreement, committing to undertake certain investigatory actions at the Site and to reimburse U.S. EPA for a substantial portion of its past administrative costs for the Site. Alternatively, the Railroads are prepared to enter into a *de minimis* settlement under a consent decree or administrative order on consent, in which they would agree to make a more significant payment to the agency in exchange for the relief provided under section 122(g) of CERCLA.

Background of Railroad Ownership and Activities at the Site

A railroad right-of-way ("ROW") traverses the portion of the Site known as Kreher Park, just north and at the base of the Upper Bluff. The ROW has existed at the Site since

[1] As agreed by the U.S. EPA and the Railroads, this good faith offer shall be considered timely submitted, *i.e.*, submitted within 60 days of the Special Notice Letter, as a result of its submittal to the EPA on or before June 30, 2011.

approximately the 1870s, when it was owned by Wisconsin Central Railroad Company, a corporate predecessor of Soo Line.[2] In 1987, Soo Line sold the ROW to WCL, the current owner, although all of the railroad tracks and ties have since been removed from the Site. As part of WCL's answers to U.S. EPA's CERCLA 104(e) information requests, WCL provided copies of license agreements with the John Schroeder Lumber Company ("Schroeder Lumber") for the maintenance of various industry spur tracks over property at the Site owned and operated by Schroeder Lumber. These documents demonstrate that the Railroads did not own the spur track property described in the agreements.

The U.S. EPA's Record of Decision ("ROD") identifies the sources of contaminants of concern at the Site as being releases of hazardous substances from a manufactured gas plant ("MGP") at the Site owned by Northern States Power Company ("NSP"),[3] along with potential contributions from the historic lumber operations of Schroeder Lumber and from solid waste disposal activities by the City of Ashland.[4] Undoubtedly, the Railroads engaged in standard railroad-related operations on the ROW over the years, *i.e.*, picking up, moving, and dropping off railroad cars.[5] Importantly, however, the Railroads are unaware of any credible evidence that Soo Line might have been involved in any loading or unloading of material into or out of rail cars at the Site. As is customary, such work almost certainly would have been undertaken by Soo Line's customers, *i.e.*, NSP or Schroeder Lumber, not Soo Line. Railroads simply are not in the business of, nor do they have the expertise or personnel for, loading and unloading rail cars. Moreover, there is no evidence that Soo Line owned the rail cars described in witness statements and deposition testimony. In the rail industry, many if not most rail cars are not owned by railroad companies but, rather, by shippers and private car companies.

Nonetheless, NSP apparently has suggested that Soo Line may have been responsible for possible releases of hazardous substances from rail cars on the Site. However, to the knowledge of the Railroads, these allegations are based on speculation from witness interviews conducted by NSP, in which the witnesses did not distinguish between (1) industrial spur tracks on property owned by businesses served by Soo Line, such as Schroeder Lumber, versus tracks on property owned by Soo Line, or (2) loading and unloading of rail cars, and associated spillage, by businesses served by Soo Line, such as NSP, versus such operations by Soo Line itself. By contrast, the witnesses in the deposition testimony obtained by NSP explicitly attributed the loading and unloading of rail cars at the Site, and associated spillage, to MGP personnel.[6] There is no credible evidence that the operations conducted by Soo Line at the Site included anything

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[2] Wisconsin Central Railroad Company is not the same entity as, or a past or present affiliate of, WCL. Wisconsin Central Railroad Company and its successor, Soo Line Railroad Company, are each referred to herein as "Soo Line."

[3] NSP and its predecessors in interest with respect to the MGP are each referred to herein as "NSP."

[4] *See* ROD at 14.

[5] Given that WCL purchased the ROW from Soo Line after Schroeder Lumber and the MGP had ceased operations, WCL would not have provided any services to such facilities. In addition, there does not appear to be any credible evidence or allegations tying either of the Railroads to the City of Ashland's solid waste disposal activities or showing that Soo Line was involved in any of the MGP or Schroeder Lumber operations in any fashion other than providing standard rail services.

[6] *See* Deposition of Gordon Parent at 22, 26-28, Ashland County Circuit Court Case No. 01-CV-76 (Oct. 16, 2001); Deposition of Ray Parent at 8, Ashland County Circuit Court Case No. 01-CV-76 (Oct. 16, 2001).

other than transportation of rail cars. Simply put, the Railroads' sole alleged connection to the contamination at the Site is their ownership of the ROW traversing the Site. Based on the Railroads' meeting with U.S. EPA at the agency's office in Chicago, Illinois on June 13, 2011 (the "June 13, 2011 Meeting"), in which representatives from the Wisconsin Department of Natural Resources ("WDNR") and U.S. Department of Justice ("U.S. DOJ") also participated by telephone, all of the governmental agencies appear to agree with this conclusion.[7]

The Railroads Are Contiguous Property Owners and, Therefore, Are Not Owners or Operators under CERCLA

The Railroads are protected from liability under CERCLA as contiguous property owners. Section 107(q) of CERCLA provides that a person who owns real property that became contaminated solely by virtue of being located contiguous to property that is not owned by that person shall not be considered an owner or operator, as long as certain elements are satisfied. 42 U.S.C. § 9607(q). In explaining this statutory provision, U.S. EPA states that a landowner must show that he:

1. did not cause, contribute, or consent to the release or threatened release;

2. is not
   a. potentially liable for response costs at the facility, or "affiliated" with any such person through any direct or indirect familial relationship, or contractual, corporate or financial relationship (excluding such relationships created by a contract for the sale of goods or services), or

   b. the result of a reorganization of a business entity that was potentially liable;

3. takes reasonable steps to:
   a. stop any continuing release;

   b. prevent any threatened future release, and

   c. prevent or limit human, environmental, or natural resource exposure to any hazardous substance release on or from property he owns;

4. provides full cooperation, assistance, and access to those authorized to conduct response actions or natural resource restoration;

5. is in compliance with any land use restrictions established or relied on in connection with a response action and does not impede the effectiveness or

[7] Review and investigation of the 1959 map of the Site provided by U.S. EPA at the June 13, 2011 Meeting strongly suggests that the pipes and other equipment shown in the vicinity of the ROW are associated with propane operations of the MGP. The number and size of the pipes (2" liquid line and a 1 1/2 " vapor line) are consistent with the unloading of the propane tanks located at the MGP facility on the Upper Bluff.

integrity of any institutional control employed in connection with a response action;

6. is in compliance with any request for information or administrative subpoena under CERCLA;

7. provides all legally required notices with respect to the discovery or release of any hazardous substance at the facility; and

8. conducted all appropriate inquiry in accordance with CERCLA §101(35)(B) at the time of acquiring the property, and did not know or have any reason to know that the property was or could be contaminated by release or threat of release of a hazardous substance from property not owned or operated by him.

U.S. EPA, *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Jan. 13, 2004) (citing 42 U.S.C. 9607(q)(1)(A)(i)-(viii)).

The Railroads satisfy each of these elements without exception or reservation. First, the Railroads did not cause, contribute or consent to any release on the Site of contaminants from the MGP, Schroeder Lumber, or any other identified sources. The ROD specifically recognizes that the primary source of the contaminants of concern at the Site was releases from the MGP, with possible contributions from the historic operations of Schroeder Lumber and solid waste disposal by the City of Ashland.[8] As noted above, any suggestion that the Railroads were involved in the release of material from rail cars is not based on any credible evidence, but rather NSP's distortions and innuendos gleaned from its own witness interviews and unsupported by subsequent deposition testimony.[9] U.S. EPA, WDNR, and U.S. DOJ have not provided any evidence supporting NSP's claims, and confirmed to the Railroads at the June 13, 2011 Meeting that they are not aware of any other information substantiating NSP's allegations.

Second, the Railroads are neither potentially liable for response costs at the Site nor "affiliated" with any such persons. Any contracts the Railroads may have had with NSP or Schroeder Lumber are excluded as contracts for "goods or services."

Third, the Railroads have fully cooperated with U.S. EPA and NSP to stop continuing releases, prevent future releases and prevent or limit exposure to the hazardous substances. In 1995 and 1998, the Railroads cooperated with the WDNR and NSP in fencing off the coal tar seeps on the Site. In 2001, the Railroads further cooperated in the investigation of a clay pipe in the area of the coal tar seeps. Most recently, the Railroads again have been fully cooperative after receiving the Special Notice Letter by: (1) meeting with NSP and the other Potentially Responsible Parties ("PRPs") at NSP's request; (2) proactively requesting a conference and then meeting in person with U.S. EPA, WDNR, and U.S. DOJ at the June 13, 2011 Meeting; and (3) making a joint proposal to U.S. EPA in this good faith offer letter.

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[8] *See* ROD at 14.

[9] *See supra* note 6 and accompanying text.

Fourth, the Railroads have provided full cooperation, assistance and access with respect to the ROW, as described in the preceding paragraph. Fifth, there are no land use restrictions or institutional controls with respect to the ROW. Sixth, the Railroads have fully complied with all U.S. EPA information requests and no administrative subpoenas have been issued. Seventh, the Railroads are not aware of any legally required notices with respect to the release of hazardous substances.

Eighth, the Railroads conducted all appropriate inquiry at the time of acquisition and did not have reason to know that the ROW had been impacted by the release of hazardous substances. The last property transaction occurred in 1987 when Soo Line transferred the ROW to WCL, along with many other miles of right-of-way and railyards. WCL retained Dames & Moore in 1987 to perform environmental due diligence on the property to be transferred and no environmental issues were identified with respect to the ROW. Soo Line cooperated in all respects and facilitated this due diligence.

In sum, the Railroads satisfy all of the elements of the contiguous property owners defense and would be happy to discuss these elements in greater detail should U.S. EPA consider that necessary. As contiguous property owners, the Railroads are "[n]ot considered to be ... owner[s] or operator[s]" under CERCLA and thus are not responsible parties for the Site under CERCLA. *See* 42 U.S.C. § 9607(q)(1). Under section 107(q)(3), U.S. EPA may, and should, decline to pursue the Railroads and, rather, grant the Railroads certain assurances and protection against a cost recovery or contribution action. 42 U.S.C. § 9607(q)(3); U.S. EPA, *Contiguous Property Owner Guidance Reference Sheet*; U.S. EPA, *Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners* (Jan. 13, 2004).

The Railroads Satisfy the Requirements of the Third-Party Defense

Under Section 107(b)(3) of CERCLA, a landowner is not a responsible party if he establishes that:

> (1) the release or threat of release and ... damages resulting therefrom were caused solely by ... an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant ... ;
>
> (2) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and
>
> (3) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3). Commonly called the third-party defense, this affirmative defense protects innocent landowners, such as the Railroads, from liability for releases caused by others. In this instance, NSP, and possibly Schroeder Lumber and the City of Ashland, solely caused the

release of hazardous substances at the Site, and there is no credible evidence of any contractual relationship between these responsible parties and the Railroads related to the hazardous substances at issue.

The third-party defense is particularly applicable in light of WCL's acquisition of the ROW in 1987 (decades after the MGP and Schroeder Lumber ceased operations at the Site) and the responsible actions taken by both Railroads with respect to environmental due diligence at the time of that transaction. The purchase and sale of the ROW is not a contractual relationship that might subject WCL or Soo Line to any liability, since CERCLA's definition of "contractual relationship" excludes deeds and other instruments transferring title or possession where the landowner acquired the property without knowledge or reason to know of the release of hazardous substances after conducting "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." 42 U.S.C. § 9601(35).

Soo Line as seller had no such knowledge at the time of the sale to WCL of the contamination at the Site that was subsequently identified by the WDNR. Prior to the acquisition, WCL retained Dames & Moore to perform environmental due diligence of the rail line and railyards acquired in the transaction. Soo Line facilitated this due diligence, and provided property access as requested by WCL in connection with the transaction. Dames & Moore did not uncover any environmental concerns with respect to the ROW or otherwise with respect to the Site.[10] This due diligence was in compliance with the applicable industry standards at the time. As such, WCL performed and Soo Line facilitated all appropriate inquiry prior to transfer of the ROW. Accordingly, and as further described above, the Railroads can demonstrate that the second and third elements of the third-party defense are satisfied.

In short, the Railroads can clearly carry their burden in establishing that they are shielded from any liability under CERCLA by the third-party defense. As with the contiguous property owner defense, the third-party defense is presented here in summary fashion, and the Railroads would be happy to further supplement this discussion with further documentation or testimony.

The Railroads Cannot Be Held Jointly and Severally Liable for the Site

Assuming *arguendo* that one or both of the Railroads might be liable parties under CERCLA, notwithstanding their valid defenses outlined above, they would be liable only for an allocable share, as any Railroad contribution to environmental conditions at the Site would be divisible. The United States Supreme Court recently altered the CERCLA landscape with its divisibility decision in *Burlington Northern Santa Fe Railway Company v. United States*, 129 S.Ct. 1870 (2009) (hereinafter "BNSF"). The Court ruled that a liable party can avoid joint and several liability by demonstrating that it may reasonably apportion liability. *Id.* at 1881. The Court agreed that factors such as percentage of property owned, length of ownership and type of

[10] Indeed, the record is clear that the environmental issues associated with the Site were not uncovered until 1989 (at the earliest) as part of the City of Ashland's proposed expansion of its wastewater treatment plant. WDNR did not perform the initial investigation of the Site until 1994 and did not notify the Railroads of the conditions at the Site until 1995.

hazardous substances released may provide a reasonable basis upon which to apportion liability. In particular, the Court accepted the defendant railroads' argument that their liability could reasonably be apportioned because they owned only a portion of the facility. Applying Section 433A of the Restatement (Second) of Torts, the Court held that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm." *Id.* The Court found that the evidence supporting apportionment need not be precise but that there must simply be "facts contained in the record reasonably support[ing] the apportionment of liability." *Id.* at 1882-83.

Under the reasoning in *BNSF*, apportionment of liability at the Site would be appropriate given the Railroads' limited property interest in the Site and the fact that the Railroads did not cause or contribute to the release of any hazardous substances on the ROW or the Site. While the Railroads are still gathering information regarding the exact scope of their historical ownership, it is no doubt limited to a small portion of the overall Site. Moreover, there is no evidence that the Railroads operated any source facility or otherwise generated any hazardous substances found at the Site. In particular, Soo Line did not conduct any operations on the tracks serving the MGP or Schroeder Lumber other than transporting rail cars. Moreover, WCL certainly did not conduct any such operations, since it did not acquire any interest in the Site until 1987, decades after the offending MGP and Schroeder Lumber operations had ceased. Based on the factors established by the Supreme Court in *BNSF*, any liability apportioned to the Railroads based on ownership, ignoring *arguendo* the defenses outlined above, would be a small fraction of the overall liability for response actions at the Site.

The Railroads' Good Faith Offer

Putting aside the lack of evidence regarding the Railroads' liability for the Site, the Railroads simply have not been given sufficient time and information to evaluate and agree to a work plan for remediation of the entire Site. The Ashland/NSP Lakefront Site is a large cleanup site requiring complex technical investigation, analysis, planning, and remediation. The primary PRP at the site, NSP, has been involved with such efforts at the Site for over a decade and was integrally involved in developing and evaluating the selected remedy. The selected remedy involves complex remedial action with respect to certain areas of the Site, such as the sediments in Chequamegon Bay, that are located hundreds of feet from the ROW and for which there is no credible evidentiary link to the ROW. Compared to the limited remedial issues that could be implicated by the ROW, the selected remedy is enormous in scope, with a total projected cost of $84 to $98 million according to the ROD, or perhaps much higher according to some sources. Even a relatively minor percentage of this total cost promises to dwarf any costs potentially attributable to the ROW. Therefore, the Railroads do not believe it is appropriate to join a consent decree that would ultimately impose joint responsibility for remediation of the entire Site among the four identified PRPs.[11]

[11] The Railroads have attempted to cooperate with NSP on a settlement proposal, including meeting with NSP at its counsel's office in Chicago at NSP's request, but have found NSP's demands, which would involve the Railroads in all elements of investigation and remediation at the Site when their only alleged connection is to the ROW, to be excessive, inconsistent with the consent decree enclosed with the Special Notice Letter and based on unsupported conclusions regarding liability for the Site.

Even if one assumed that the Railroads have some potential owner liability for the ROW, the Railroads have not been given sufficient time or information to prepare a detailed work plan to investigate and characterize conditions in the ROW or to evaluate how to engage in a portion of U.S. EPA's selected remedy (or an appropriate alternative) that is limited to the ROW. Other than receiving and responding to U.S. EPA's requests for information under section 104(e) of CERCLA in 2008, the Railroads have had no involvement with respect to the agency's administrative actions at the Site until receiving the Special Notice Letter approximately two months ago. In addition, the Railroads are still waiting to receive documents from U.S. EPA in response to a request for documents submitted by Soo Line on May 19, 2011 under the Freedom of Information Act ("FOIA").[12] The documents the Railroads have obtained regarding the Site, including the ROD, suggest that the investigation of the ROW itself has been limited to date.[13] As such, the Railroads have not been given sufficient time and information to develop or evaluate a detailed work plan for even that very limited part of the Site. However, as part of their good faith offer, the Railroads are willing to perform an investigation of the ROW that should provide clarity regarding any potential source areas on the ROW or any required remedial action with respect to the ROW.

In light of the considerations discussed above, the Railroads submit the following two-part good faith offer in response to the Special Notice Letter. The Railroads propose to:

(1) Conduct and/or fund additional environmental investigation of the ROW; and

(2) Make a combined lump sum payment of four hundred thousand dollars ($400,000) to U.S. EPA to reimburse the agency for a substantial portion of its administrative costs to date.

Regarding the first part of the proposal, the Railroads are willing to conduct and fund an investigation and characterization of the soil and shallow groundwater of the ROW.[14] Because the investigation to date of the ROW has been limited, this additional investigation may be required to determine the extent of any source areas originating on the ROW. The proposed investigation would seek to answer, in an expeditious manner, the following two questions: (i) Does the ROW require remediation? and (ii) If so, what was the source of the release? If the

[12] While the Railroads at this time have no objection to U.S. EPA's extension of the time period in which to respond to Soo Line's FOIA request, the agency cannot reasonably expect the Railroads to respond to the Special Notice Letter at the same time that U.S. EPA is seeking to extend the period in which it provides the basic information it has gathered concerning the Site.

[13] There has understandably been no systematic investigation of the ROW, since there does not appear to be any evidence that the ROW is a source of contaminants or a heavily impacted area. Any soil and groundwater investigation at or near the ROW appears to have been coincidental and unrelated to the Railroads' ownership or operation of the ROW.

[14] The ROD establishes, and U.S. EPA staff confirmed at the June 13, 2011 Meeting, that no evidence has been uncovered at this point suggesting that there is any connection between the ROW and any of the deep groundwater underlying the Site, the contaminated sediments in Lake Superior, or the Upper Bluff. Nor is there any evidence that would suggest any credible basis for inferring that any activities within the ROW contributed to any deep groundwater impacts. Accordingly, the Railroads propose to limit their investigation to the soil and shallow groundwater within the ROW.

investigation finds that the ROW requires remediation under CERCLA and that the Railroads have some causal connection to the release, the Railroads anticipate making a proposal to address an appropriate portion of the required remedial design/remedial action with respect to the ROW. Obviously, it would be premature to discuss the contours of such a proposal with U.S. EPA until the ROW investigation has been completed.

With respect to the proposed investigation, however, the Railroads have engaged Golder Associates, an environmental consultant, to develop a draft investigatory work plan and, as part of this good faith offer, further propose to discuss with U.S. EPA the details of the appropriate scope of work and schedule for completion of such investigation. At present, the Railroads will await U.S. EPA's reply to this offer to avoid disrupting or interfering with the agency's overall administration of investigation and remediation at the Site.

Regarding the second part of the proposal, the Railroads understand that U.S. EPA has expended significant financial resources at the Site over several years, and that for some reason U.S. EPA has not been reimbursed by NSP for approximately $1.3 million in costs relating to the Site. In spite of the lack of evidence supporting any Railroad liability for the Site, the Railroads propose to make a combined lump sum payment of $400,000 to U.S. EPA to defray its past administrative costs at the Site. This proposed payment does not represent an admission of liability by the Railroads, but, rather, is made as a good faith offer designed to avoid the incurrence of unnecessary litigation and administrative costs on the part of both U.S. EPA and the Railroads and to respond to the Special Notice Letter.

The Railroads are willing to enter into an administrative order on consent, or other appropriate agreement, committing to (1) perform the ROW investigation referenced, and (2) make the above-described $400,000 lump sum payment. Because any such agreement would obviously involve Site work and legal and technical issues that are substantively and procedurally different from those addressed in the draft consent decree enclosed with the Special Notice Letter, the Railroads have not provided a line-by-line response to the draft consent decree in this good faith offer letter. Nonetheless, the Railroads would be willing to supplement this letter accordingly should the U.S. EPA consider that necessary to move forward in connection with this offer. Additionally, the Railroads understand that U.S. EPA and NSP are already negotiating changes to the draft consent decree enclosed with the Special Notice Letter, and the Railroads do not want to unnecessarily complicate or delay completion of the consent decree or the issues addressed therein by combining the matters properly addressed to NSP with those outlined in this good faith offer letter.

Finally, as an alternative to the two-part proposal described above, the Railroads would be willing to make a single lump sum payment in the amount of one million dollars ($1,000,000) to the U.S. EPA in exchange for a *de minimis* settlement under section 122(g) of CERCLA. The Railroads believe that such a *de minimis* settlement is appropriate given (1) the lack of any credible evidence of Railroad liability with respect to the Site despite years of investigation performed by NSP and others, and (2) the possibility that U.S. EPA may view further investigation of the ROW to be unnecessary in light of the already-investigated sources of contamination and required remediation at the Site and the broader investigatory and remedial

scheme already developed by the agency. As above, because any such *de minimis* settlement would include issues considerably different from those in the draft consent decree, the Railroads have not provided a line-by-line response to the draft consent decree in this letter but would be willing to supplement this letter accordingly should the agency consider that necessary to effectuate a *de minimis* settlement alternative.

The Railroads would like to discuss this good faith settlement offer with U.S. EPA within the next 30 days. Should U.S. EPA have any questions regarding the Railroads' proposals or other matters discussed herein, please do not hesitate to contact the undersigned or outside counsel for either of the Railroads, who are copied below on this letter.[15]

Sincerely,

Richard A. Verkler
Wisconsin Central Ltd.

William M. Tuttle
Soo Line Railroad Company

cc: Robert M. Baratta, Jr., Esq. (counsel for Wisconsin Central Ltd.)
Gregory A. Fontaine, Esq. (counsel for Soo Line Railroad Company)

[15] Messrs. Baratta and Fontaine represent WCL and Soo Line, respectively, in these negotiations. Mr. Baratta may be contacted at Freeborn & Peters LLP, 311 South Wacker Drive, Chicago, Illinois 60606, telephone (312) 360-6622. Mr. Fontaine may be contacted at Leonard, Street and Deinard, 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402, telephone (612) 335-7114.